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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

METROPOLITAN WATER DISTRICT, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD et al., Respondents.	No. B173439 (W.C.A.B. No. VNO 0357362)

PROCEEDING to review a decision of the Workers' Compensation Appeals Board. Annulled.

Bagby, Gajdos & Zachary and Larry D. Preece for Petitioner.

No appearance for Respondent Workers' Compensation Appeals Board.

Appel & Rimbach and Barry M. Appel for Respondent May Woo.

Los Angeles County Metropolitan Water District seeks review of an order of the Workers' Compensation Appeals Board. The order denied the District's petition for reconsideration and, instead, reaffirmed its decision in favor of May Woo, decedent Chun Fee (Joe) Woo's wife. The Board found Joe Woo's death was substantially caused by the harassment of his supervisor. We conclude that there is no evidence in the record that the supervisor's actions were harassment and not good faith personnel actions. We hold that Woo's death is not compensable pursuant to Labor Code section 3208.3, subdivision (h).[1]

The Board's record is unavailable. The parties have authorized the court to base its decision on the exhibits accompanying their briefs.

FACTUAL AND PROCEDURAL SUMMARY

Woo was a senior engineer employed by the District since 1986 and in contract administration from 1994 until June 23, 1997. On June 23, 1997, Woo took a leave of absence after receiving a poor performance evaluation. One month later, on July 23, 1997, Woo, along with his mother and daughter, visited his brother in Hong Kong. Woo's brother, Chun Wai (Eddie) Woo, lived in a high-rise apartment building. After Eddie had left for work, Joe Woo's daughter observed her father looked tired and suggested he take a rest. Woo went to his room. Soon thereafter, Woo was found dead on the sidewalk 21 floors below. There were no witnesses and there was no suicide note. Nothing in the room had

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[1] Labor Code section 3208.3, subdivision (h) provides: "No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action."

All further statutory references are to the Labor Code.

been disturbed and the window was not broken. The police did not determine whether it was an accident, homicide, or suicide, but Eddie Woo's testimony supports suicide.

Eddie Woo received a call at 10:30 a.m. informing him of Joe's death. He was not surprised by the news because he knew Joe was very depressed. Two weeks earlier Eddie had visited Joe in Los Angeles. Joe had complained to him that he was being harassed and treated unfairly by his boss. Joe also refused to go anywhere with him, which was not normal. He was having difficulty sleeping and was worried about his family. Eddie also explained that given the arrangement of the room and the height of the window, it was inconceivable that Joe accidentally fell or was thrown out of the window.

Woo had received only complimentary reviews and regular promotions from his previous supervisors. Ann Finley, also a senior engineer, was hired from the Los Angeles Department of Water and Power and became Woo's supervisor in August 1995. Finley testified to being equable and justified the performance evaluation. She considered Woo's work substandard for his job classification and level based on the District's expectations. For example, Woo was in charge of tracking expenditures to various vendors each year. Finley noted mistakes each year that went uncorrected even after she pointed them out to Woo and he had acknowledged them.

Finley was in a management position with the authority to correct Woo's work. She did so by making changes to his reports in red ink and by verbally advising Woo of his errors. She counseled Woo to use the computer more, all to the end of achieving better performance consistent with his status. In May 1996, Finley's supervisor began tracking dates and times of assignment to Finley; Finley followed suit with her subordinates. There was a change in the District's policy in 1997 demanding greater productivity from its employees. Woo was actually

assigned less work because he did not use the computer for certain tasks, thus decreasing his output. She tried to get Woo to use the computer more and to write memoranda in the style of her superiors, Deborah Levine and Bob Schempp. She gave Woo his assignments in writing at his request after they realized he was becoming confused over priorities changed orally. Her criticisms were constructive. Finley wanted him to be a successful team player. She was not only critical but complimented his good work as well. When she was first hired, Finley believed Joe did quality work based on earlier memoranda ostensibly written by him in 1991 and 1994. By the time of the 1997 evaluation, she wondered if he had actually written the final drafts.

Displays of temper by Woo were rare; Finley remembers seeing him angry only twice. Finley recalled one time when Woo screamed at her and another time when she raised her voice in response to his shouting at her. Woo was receptive to self-improvement books and classes.

Before the evaluation she met with someone from Human Resources and someone from the legal department; they both attended the meeting. She was going to state that Woo "Needs to Improve" in certain categories, but was advised instead to state that he "Meets Standards" and give a 90-day performance plan. The plan would provide the measure for the next evaluation which, "If . . . not satisfactorily completed, discipline can be imposed." Woo showed no emotion but said he was surprised by the evaluation. He did not tell her he could not meet the performance plan requirements. He did not dispute the performance evaluation and signed it. He never told her he was stressed by her requirements. He never told her he was depressed and he never appeared depressed. In the six months before his death, Finley did not notice any change in Woo's performance or his mental state.

The day after the evaluation, Woo and Finley traveled to Hoover Dam for a three-day conference. They arrived at the airport separately, but drove to the conference together. He did not appear depressed. They did not discuss the evaluation. Two hours into the first day, Woo said he felt unwell and wished to leave at the lunch break. They traveled to the airport together. During the drive, Woo told Finley he did not feel well because of the evaluation. She told him that she had been in a similar situation with a prior employer. She had taken two weeks off and came back to work with a new attitude.

Woo's wife called Finley at 10:15 p.m. that night and asked if she would approve a three-month leave of absence for Woo to travel. Finley said she would, but needed approval from her superiors. Finley talked to May Woo again the following evening and told her how to apply for leave and also about medical leave. May Woo said Woo was fine, he just needed some rest and relaxation.

Finley believed Woo was overall a competent administrator. However, he was resistant to change. Woo refused to hear what she was trying to say. He was combative and disrespectful.

Coworker William Bohus, an associate engineer, was hired in June 1994 and worked in the cubicle adjacent to Woo for six to eight months before Finley was hired. Approximately eight months after Bohus was hired, their supervisor, Grant Nelson, retired. They had an interim supervisor, Debbie Levine, for approximately the next eight months, then Finley was hired to replace Nelson. Bohus transferred to another department in April 1997. Finley was overbearing, demanding, and critical of both Woo and him. Woo complained that he felt pressured from being rushed by Finley. So did Bohus. Bohus told Woo to work it out with Finley before going over her head. Grant Nelson had orally communicated changes to their written work, but Finley made changes in red ink. The red marks primarily changed choice of wording, not substance. Woo complained to Bohus that no

matter how hard he tried, he could not meet Finley's standards, that Finley was unfair and did not correct others as she did him. Woo was frustrated. Bohus never heard Finley criticize Woo about anything other than his work. One time he heard raised voices, but he does not know what it was about as he walked away. He overheard Finley angrily criticizing Woo's work one or two times per week. Woo did not look depressed when they worked together. But, he noticed Woo's demeanor change. Bohus believed Woo's work was concise, clear, and of high quality. Woo was calm and always behaved professionally.

While under Finley, Bohus attended a report writing class to improve his writing skills. His evaluations improved.

Albert Cheng, a friend and coworker in another department, sometimes carpooled with Woo and met him for lunch or on break one day per week. Cheng had previously worked with Woo under Grant Nelson and believed Woo's work was excellent, but he never reviewed Woo's work. He testified that before Finley was hired, Woo was outgoing but afterward he was quiet and unhappy. He transferred in 1994.

Whenever they were together, Woo complained about Finley's nitpicking and her complaints about the quality and quantity of his work. In 1996, Woo asked Cheng about transferring to his department. Cheng talked to his supervisor but there were no openings at that time. Woo told Cheng he was looking at job postings. Cheng noticed Woo becoming depressed. He did not know if Finley's criticism of Woo's work quantity was justified.

Woo's best friend, Kuen Lee, a professor at Los Angeles Trade Tech, met Woo in graduate school and lived nearby. They visited two or more times per week. Before January 1997, Woo rarely mentioned his job, not even once a year; he was happy with his work. Thereafter Woo complained that Finley picked on him. He showed Lee the evaluations. Woo complained that the bad evaluation

impaired his ability to do his job. Lee noticed Woo change in April or May of 1997. Woo told Lee he felt hopeless and could not get out of a sad situation. Woo said he was intimidated by Finley, that she screamed at him and insulted him. Between the time Woo left work and before he went to Hong Kong, Lee saw him at least once a week and spent considerable time with him. Woo did not tell Lee why he was going to Hong Kong, nor that he contemplated suicide. Woo was not impulsive, but deliberative.

Notes written by Woo to himself following the evaluation related, "She likes computer, adds on too much pressure to push for using computer but in a stressful way. . . . Two weeks ago she gave me an unfair evaluation, unfair in a way that a lot of things are made up, story made up, memo on May 15 not giving to me at all. . . . The procedure for evaluation is not proper. She ganged up with two others upon management to do it together and I was turned down. I speak along by Bob (the last name can't be read) the procedure used not expected. I couldn't sleep at all. The feeling of unable to explain the problem of unfair evaluation is hopeless. I am unable to drive, still try to struggle so I can come visit doctor and not add burden on my wife. Things may help now, sleeping and driving." Another note written over one year earlier on February 21, 1996 stated, in part, '"[W]ith your attitude I bet you must have problems with your wife and family too . . . has me put in not flexible . . . more than minimum instruction to perform. . . . Couldn't give example of assignment that needs more than minimum instruction. . . . Couldn't give example of not flexible."'

Woo complained about Finley to union representative Paula Moyer two or three times within a few months prior to his death. Moyer explained the options available to him, including an informal meeting with Finley, talking to another supervisor, transferring, filing a grievance, filing a harassment claim, filing a workers' compensation claim for stress, and even filing a discrimination claim as

Woo said he believed Finley treated female employees better. She advised him to document whatever his supervisor did. Woo did not want to file anything and said he had spoken to a former supervisor about transferring. Woo told her Finley would frequently blow up and rant and rave. Woo feared retaliation and did not want to make waves.

To his wife Woo expressed his disappointment with the evaluation. He was afraid he would lose his job. Until the job evaluation, Woo was performing his usual and customary job duties and was not being treated by a psychiatrist. Woo was shocked by the evaluation. Three to four days after the evaluation, he stopped working. Two to three weeks later, he went to a psychiatrist. Woo was not afraid to drive until after the performance evaluation. May Woo took approximately five to seven days off to care for Woo during the month he was off work before going to Hong Kong.

Woo told her that the evaluation was unusual because Finley's supervisors, Bob Schempp and Deborah Levine, were also at the meeting. He felt they were ganging up on him. Bob Schempp, whom he had considered an ally, had supported Finley, refused to speak with him alone, and told him, '"Let this be a wake-up call."' Schempp was a former supervisor of Woo. Woo also told his wife he believed that Finley wanted to get rid of him so she could hire her friends, and that maybe she was trying to get him to retire. Woo was depressed when Finley was appointed in 1995, but he got over it.

After the evaluation in June 1997, Woo lost his appetite, could not sleep and was tired, listless, and withdrawn. He told May that he felt humiliated and could not face Finley or her superiors. They had no financial or marital problems. She proposed to Woo that he retire and they go into business together. Woo was not an impulsive person.

Woo's last day at work, June 23, 1997, began with a trip with Finley to Las Vegas for a meeting. He left the meeting early and came home. He became withdrawn and would not talk. He had no appetite and difficulty sleeping. A few days later, Woo underwent a physical examination from internist, Dr. Hanson, who found no physical problems and referred Woo to a psychiatrist.

May saw no signs of suicide in Woo. Relating incidents when Woo felt Finley was unfair, May remembered Woo became "upset and spoke loudly about an incident with Miss Findley [*sic*]. Miss Findley [*sic*] said, 'You must have a problem at home with your wife.' Deceased responded that he did not have a problem and suggested to Miss Findley [*sic*] that she call the witness. Deceased's face turned red, and he raised his voice while relating the incident to the witness [May]." Another time Finley made minor changes to a document and called it trash. Woo said he did not know how to work with her. She made unreasonable demands, would not accept staff estimates on the amount of time to complete assignments, would reduce the time estimates and would change priorities on him several times in one day. Finley told Woo he needed more initiative and demanded he report to her more often. He was to maintain a log of all his phone calls and completed tasks which Woo believed was too time consuming.

Finley told Woo he needed to be more vocal at meetings. Woo told May it was embarrassing to go with Finley and others because she would make incorrect statements and tried to dominate the meeting. Woo said he preferred just to be quiet rather than support Finley's incorrect statements. May did not know if Woo ever discussed this with Finley.

On June 26, 1997, Woo sought treatment from his general practitioner, Dr. Hanson. He complained of depression, anxiety, and fatigue due to work. Dr. Hanson gave Woo a two-week leave of absence for stress from June 25, 1997, to July 10, 1997. Woo complained of weight loss, loss of appetite, and insomnia.

Woo saw Dr. Suzuki, a psychiatrist, on July 10, 1997, and was given antidepressants and sleep medication. He saw Dr. Suzuki again on July 11 and 16. Dr. Suzuki stated that Woo was severely depressed, but not suicidal.

Dr. Warick reported as the medical expert for the District. He found no mental disorder based on the current Diagnostic and Statistical Manual of Mental Disorders. He also found suicide unlikely because Woo left no note, had no financial pressure, took his daughter and mother along to Hong Kong, and was Catholic. Dr. Halote, Woo's medical expert, found suicide due to depression from harassment by Finley the only reasonable conclusion.

The workers' compensation judge reviewed a memorandum written by Woo and found Finley's assessment of Woo's writing ability to be warranted. He reviewed Finley's editing of the memorandum and thought it tactful.[2] The judge found Woo had not met the burden of proof. Based on Finley's credible testimony, the judge found no industrial injury because Woo's work was substandard and the evaluation was warranted. The judge further found that actual events of employment did not cause depression. Relying on Dr. Warick, the judge found no mental disorder.

The Board disagreed, finding actual events of employment did cause depression based on Dr. Halote. Further, the Board found the performance review and Bohus's testimony proof that Finley had harassed, belittled, and micromanaged all aspects of her subordinates' work, including, their personalities.

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2 The memorandum is not appended to the briefs, but Finley's note was quoted in the District's petition for reconsideration. The note stated, '"Please review my modifications to your letter--I would prefer that you understand my revisions which, I think made the letter easier to understand and follow. Please modify or adapt to this writing style as it meets Debi [Levine] and Bob's [Schempp] style.' Thx—Ann."

Conceding that Finley believed her criticisms justified and fair, the Board added, "she evidently had an injudicious way of expressing them, referring to Bohus as 'scatterbrained' in her trial testimony." The Board criticized the evaluation as attempting to change Woo's personality, asking him to be more assertive and aggressive. It also found Finley's criticism of Woo's typing ability to be nitpicking. The Board also faulted Finley for being inconsistent in her written evaluation of Woo; on the one hand, "most of [Woo's] work needed line-by-line review" but, on the other, "he had done well in performing supervisory tasks including training, reviewing, and *correcting all written documents* produced by an assistant engineer in their section." And, the Board implied an admission of bad faith from Finley's consulting with legal and Human Resources before presenting Woo with the evaluation.

The District petitioned for reconsideration contending there was no proof of suicide, no diagnosis of a psychological injury as required by the Labor Code, no evidence of greater substantiality to overcome the workers' compensation judge's finding that Finley was credible and that if there was injury it was due to the evaluation which was a good faith personnel action.

The Board denied the petition with an opinion incorporating its previous decision. It further stated that testimony from the family supported suicide and the lack of definitive findings by the Hong Kong police was not binding on the Board. Moreover, the Board continued, the San Marino Psychiatric Associates' record described Woo as suffering from job stress and insomnia attributed to his supervisors' treatment, and Dr. Halote stated Finley's harassment was the predominant cause of Woo's depression and suicide regardless whether he ever made an official diagnosis of same. The Board further stated that the evaluation undermined Finley's credibility and the testimony of Bohus and of the family supported finding a pattern of oppression and harassment over a period of time

culminating in the personnel action which was the last straw. Finally, the Board noted that Dr. Warick's opinion that Woo had no mental disorder was conclusionary and belied by the medical reports reviewed by Dr. Warick.

DISCUSSION

Review by this court may not be extended further than to determine whether the appeals board acted without or in excess of its powers, the order, decision, or award was not supported by substantial evidence and the findings of fact support the order, decision, or award. (§ 5952.) Further, the court is not permitted to hold a trial de novo, or take evidence, or to exercise its independent judgment on the evidence. However, a purported finding of fact is not binding on the court when facts are not in dispute and the question is one of law. (*Reinert v. Industrial Acc. Com.* (1956) 46 Cal.2d 349, 358.)

I

The District contends there was no substantial evidence of suicide, the police report was inconclusive and the witness's testimony was mere speculation. The District questions the Board's reliance on *Chu v. Workers' Comp. Appeals Bd.* (1996) 49 Cal.App.4th 1176, contending there are two distinguishable features. The District first contends that Chu died before section 3208.3 was amended to bar claims due to good faith personnel actions, and second, that Chu indicated his suicidal intentions, while Woo did not.

Chu was an upwardly bound police officer elevated to sergeant. As a sergeant, his performance was found lacking and his previously excellent evaluations declined to substandard. Chu felt nothing he did would please his supervisor. He feared demotion and loss of respect. He had no options. He spoke of murdering his supervisor and himself and eventually acted, shooting only

himself. Suicide is a not a compensable work injury unless it is inspired by an uncontrollable impulse.[3] To defeat the claim, City argued Chu's suicide was willful because his mind was not deranged or disordered and the decision was undertaken after consultation with his psychologist, the church, his friends, and family. The court found otherwise, based on expert medical opinion.

The District contends that, unlike Chu, Woo never indicated he was suicidal and the police report is noncommittal. There was substantial evidence that Woo was depressed. Dr. Halote explained the connection between depression and suicide. There was no evidence that Woo's death was accidentally or intentionally caused by another and, according to his brother, Woo could not have fallen by accident. The Board's inference that Woo's death was suicide due to depression is not unreasonable. The District has not argued on review that Woo's death was willful rather than the result of an irresistible impulse. Therefore, other than its factual similarities, *Chu* has no bearing on this case because the good faith personnel action bar did not exist at that time. Had it been in existence, Chu's claim would have been barred.

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[3] Section 3600, subdivision (a)(6) bars compensation when the employee has willfully and deliberately caused his or her own death unless the suicide was due to an irresistible impulse. (*Donovan v. Workers' Comp. Appeals Bd.* (1982) 138 Cal.App.3d 323, 327.) If expert testimony shows that without the industrial injury there would have been no suicide, the injury is a proximate cause of the death. (*Burnight v. Industrial Acc. Com*. (1960) 181 Cal.App.2d 816, 828 [job stress caused depression that gave rise to suicidal impulse].) To defeat a claim for death benefits, the employer must show not only that the employee voluntarily committed suicide but also that he could have resisted the impulse to do so. (*Donovan*, at p. 327.)

II

The District contends there was no substantial evidence to support any finding that the decedent had a mental disorder as defined by the Diagnostic and Statistical Manual of Mental Disorders as required by section 3208.3, subdivision (a).[4] The Board is required to decide questions of fact in accordance with the preponderance of the evidence pursuant to section 3202.5. Once it makes a factual determination, its ultimate findings, if supported by substantial evidence, are binding on the parties in the appellate courts. (*LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627, 637.) The Board inferred a diagnosis from the medical record that Woo was depressed based on Dr. Warick's concurrence with Dr. Hanson that decedent required psychotropic medication for depression and anxiety. The statute requires a diagnosis of a mental disorder "using terminology from the Diagnostic and Statistical Manual of Mental Disorders." In his report of July 8, 1997, Dr. Warick stated "diagnosis . . . anxiety and depression." On

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[4] Section 3208.3, subdivision (a) provides: "A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2 or, until these procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine."

Section 139.2, subdivision (j)(4) states: "Procedures to be used in determining the compensability of psychiatric injury. The procedures shall be in accordance with Section 3208.3 and shall require that the diagnosis of a mental disorder be expressed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine."

July 16, 1997, Dr. Warick stated that Woo continued to be severely depressed and prescribed antidepressant medications. The District contends these are not mental disorders described in the manual but are symptoms of mental states.

The manual describes criteria for major depressive episode to require at least five symptoms to be present during a two-week period and represent a change from previous functioning and at least one of the symptoms is depressed mood. (Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) American Psychiatric Association, p. 327.) The record reveals Woo exhibited depressed mood, loss of appetite, weight loss, insomnia, psychomotor retardation, fatigue, and feelings of worthlessness. Each is among the symptoms listed in the manual. This is sufficient evidence to support finding a diagnosis using the terminology and criteria of the manual. We accord the Board's statutory interpretation great weight as the constitutional agency charged with enforcement and interpretation of the statute and find that it is not clearly erroneous. (*Cannon v. Industrial Acc. Comm.* (1959) 53 Cal.2d 17, 22; *Industrial Indemnity Co. v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 633, 638.)

III

The District next contends it was error for the Board to reverse the workers' compensation judge's finding that Finley was credible because the workers' compensation judge's findings on credibility are entitled to great weight and may be overturned only on facts of considerable substantiality which the Board did not present. (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 318-319; *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-281.) However, credibility of witnesses is not a question of law (*Gaytan Engineering Co.*

v. Ind. Acc. Com. (1950) 95 Cal.App.2d 740, 742), and the reviewing court may not reject evidence credited by the Board unless its unreliability is apparent without resort to inferences or deductions. (*Lockheed Aircraft Corp. v. Ind. Acc. Com.* (1946) 28 Cal.2d 756, 760.) The Board found Woo's evaluation and the performance requirements prepared by Finley belied her testimony that she was not overly critical or harsh toward Woo. The Board also relied on the testimony of Woo's coworker, Don Bohus, and family testimony.

Finley may have downplayed the severity of her supervisorial technique, which was perceived as harassing. However, Finley acted only within the bounds of her supervisory authority which included establishing report standards, deadlines, and priorities. The only substantial evidence that Finley shouted at Woo was from Finley herself, who admitted to raising her voice twice, and from Bohus, who heard raised voices in the adjacent cubicle one time. Bohus also heard Finley angrily criticize Woo's work once or twice per week. And, there was one incident made personal, when Finley, in reference to Woo's attitude, suggested it must cause problems at home.

The Board's finding that Finley was not credible regarding her methods and manner of supervision does not establish bad faith. Nor can merely declaring that a supervisor's actions are harassment automatically turn an otherwise good faith personnel action into a bad faith personnel action. This is not the first time the Board has found an injury to be compensable due to supervisory harassment, by declaring harassment is, ipso facto, bad faith. (See, e.g., Cal. Workers' Compensation Practice (Cont.Ed.Bar 4th ed. 2003) § 2.56, p. 95, which states that, "supervision by harassment, ridicule, and generally unprofessional conduct is not, however, a good faith personnel action[,]" and cites *County of Kern v. Workers'*

Comp. Appeals Bd. (1998) 63 Cal.Comp.Cases 1068, 1069, and *Contel of California, Inc., v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 847.) In *County of Kern, supra*, the Board declared that when a supervisor engaged in an "ongoing campaign of harassment, ridicule, demoralization, and unprofessionalism," it was "bad faith harassment." In *Contel of California, supra*, when the supervisor warned the employee that one more absence would result in termination, but the absences were in fact excusable pursuant to the employer's policy manual, the warning was held to be bad faith harassment. These are not proper analyses. Once it has been determined that actual events of employment are the predominant cause of a psychiatric injury, the workers' compensation judge must decide if any of the events are good faith personnel actions and whether those acts were a substantial cause of the injury. (*Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241, 247 (en banc).)

IV

The Board's findings on questions of fact are conclusive if based on supporting evidence in the record. But the construction of a statute and its applicability to a given situation are matters of law that are reviewable. (*Rex Club v. Workers' Comp. Appeals Bd.* (1997) 53 Cal.App.4th 1465, 1470-1471; *Ralphs Grocery Co. v. Workers' Comp. Appeals Bd.* (1995) 38 Cal.App.4th 820, 828.) And, even though the Board's construction of statutes that it is charged to enforce and interpret is entitled to great weight (*Cannon v. Industrial Acc. Comm.* (1959) 53 Cal.2d 17, 22; *Industrial Indemnity Co. v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 633, 638), an erroneous interpretation or application of law by the Board is a ground for annulment of its decision. (*Rex Club, supra,* at p. 1471.)

When interpreting a statute, the Legislature's intent should be determined and given effect. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230; *Williams v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 1260, 1265.) The best indicator of legislative intent is the plain meaning of the statutory language, when clear and unambiguous. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387-388; *Moyer, supra,* 10 Cal.3d at p. 230; *Boehm & Associates v. Workers' Comp. Appeals Bd.* (1999) 76 Cal.App.4th 513, 516; *Williams, supra,* 74 Cal.App.4th at p. 1265.) When the Legislature has stated the purpose of its enactment in unmistakable terms, we must apply the enactment in accordance with the legislative direction, all other rules of construction must fall by the wayside. Speculation and reasoning as to legislative purpose must give way to expressed legislative purpose. (*Milligan v. City of Laguna Beach* (1983) 34 Cal.3d 829, 831.)

"Section 3208.3 was enacted as part of the Margolin-Greene Workers' Compensation Reform Act of 1989. It is part of the Legislature's response to increased public concern about the high cost of workers' compensation coverage, limited benefits for injured workers, suspected fraud and widespread abuse in the system, and particularly the proliferation of workers' compensation cases with claims for psychiatric injuries." (*Lockheed Martin, et al., v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1237, 1242 [§ 3208.3 also applies to psychiatric injury that is a compensable consequence of a physical injury]; *Hansen v. Workers' Comp. Appeals Bd.* (1993) 18 Cal.App.4th 1179, 1183-1184.) "The Legislature's expressed intent in enacting Labor Code section 3208.3 was to establish a new and higher threshold for compensability for psychiatric injury. [Citations omitted.]" (*Lockheed Martin, et al.*, at p. 1242; § 3208.3, subd. (c).) In accordance with this more restrictive policy, subdivision (h) provides that: "No compensation under this division shall be paid by an employer for a psychiatric

injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. The burden of proof shall rest with the party asserting the issue."

We turn next, then, to the question of whether Finley's course of conduct as Woo's supervisor constituted personnel actions and, if so, whether those actions were in good faith. A personnel action has been defined as conduct attributable to management in managing its business including such things as done by one in authority to review, criticize, demote, transfer, or discipline an employee in good faith and not limited to a termination of employment. (*Larch v. Contra Costa County* (1998) 63 Cal.Comp.Cases 831, 833-839, and *Stockman v. State of California/Dept. of Corrections* (1998) 63 Cal.Comp.Cases 1042, 1044-1047.) "An employer's disciplinary actions short of termination may be considered personnel actions even if they are harsh and if the actions were not so clearly out of proportion to the employee's deficiencies so that no reasonable manager could have imposed such discipline." (*Larch v. Contra Costa County, supra, 63 Cal.Comp.Cases* at pp. 833-834.) "It is unnecessary, moreover, that a personnel action have a direct or immediate effect on the employment status. Criticism or action authorized by management may be the initial step or a preliminary form of discipline intended to correct unacceptable, inappropriate conduct of an employee. The initial action may serve as the basis for subsequent or progressive discipline, and ultimately termination of the employment, if the inappropriate conduct is not corrected." (*Id*. at pp. 834-835.) What constitutes a personnel action depends on the subject matter and factual setting for each case. (*Ibid*.) Finley's actions which the Board found constituted harassment fit the definition of personnel actions. The question now becomes whether those actions were in good faith.

A good faith personnel action may elude precise definition or a precise set of rules, but it exists when a regular and routine employment event is carried out in a

reasonable manner with no hint of improper motive. (*City of Oakland v. Workers' Comp. Appeals Bd.* (2002) 99 Cal.App.4th 261.) "[T]he Legislature's 'good faith personnel action' exemption is meant to furnish an employer a degree of freedom in making its regular and routine personnel decisions (such as discipline, work evaluation, transfer, demotion, layoff, or termination). [Fn. omitted.] If a regular and routine personnel decision is made and carried out with subjective good faith and the employer's conduct meets the objective reasonableness standard, section 3208.3's exemption applies." (*Id*. at p. 267.) Any analysis of good faith must look at the totality of the circumstances.

The objective good faith standard was set forth by the California Supreme Court in *Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93 and incorporated in *Larch, supra*. It places "[T]he trier of fact in the position of the 'reasonable employer' in deciding whether the defendant . . . acted responsibly and in conformity with prevailing social norms . . . ." (*Larch v. Contra Costa County, supra, 63 Cal.Comp.Cases* at p. 837.) "Any analysis of the good faith issue, therefore, must look at the totality of the circumstances, not a rigid standard, in determining whether the action was taken in good faith. To be in good faith, the personnel action must be done in a manner that is lacking outrageous conduct, is honest and with a sincere purpose, is without an intent to mislead, deceive, or defraud, and is without collusion or unlawful design." (*Ibid*.)

Here, the Board based its finding of harassment, and ipso facto bad faith, on Finley's "injudicious" manner of expression as evidenced by her referring to Bohus as "scatterbrained" at trial. Her criticism of Woo's personality and typing skills was also cited as evidence of bad faith. Finally, an apparent inconsistency in the evaluation was cited as implicit proof that Woo's work was acceptable--Woo's

work required almost line-by-line editing, however, Finley could rely on Woo to review and edit the work of an assistant engineer. The Board also implied an improper motive from Finley's consultation with management in the Departments of Human Resources and Legal before presenting Woo with the performance review.

We are unable to comprehend how consulting with managers in Human Resources and Legal before delivering an evaluation that may prelude a demotion can be considered evidence of bad faith. It appears to us to be evidence of the exact opposite. The court is not bound by an irrational inference.[5] We also do not see any inconsistency in Woo's inability to create a document that did not require Finley's line-by-line review, yet he was able to correct an assistant engineer's work because an assistant engineer is quite obviously a position that is subordinate to Woo's position as a senior engineer. Nor do we believe it is within the Board's purview to second-guess whether typing or assertiveness were important components of Woo's job requirements. Supervisorial duties include criticisms of the employee's work. Micromanaging and criticizing a subordinate's work, angrily on occasion, may rise to the level of harassment. But, if the incidents also constitute personnel actions, it must be determined if the actions were in good faith.

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5 The Board may draw inferences from the evidence. (*Phoenix Indem. Co. v. Ind. Acc. Com.* (1948) 31 Cal.2d 856, 859.) But, the reviewing court determines whether the evidence is susceptible to the inference drawn. (*Coborn v. Industrial Acc. Com.* (1948) 31 Cal.2d 713, 716.)

The Board conceded that Finley believed her criticisms were justified and fair, meeting the subjective standard for a good faith personnel action. There is no evidence that the personnel actions were other than "honest and with a sincere purpose, . . . without an intent to mislead, deceive, or defraud, and . . . without collusion or unlawful design." (*Larch, supra,* at p. 837.) The Board's decision hinges entirely on the language, "the personnel action must be done in a manner that is lacking outrageous conduct." (*Ibid*.) But these factors are not to be considered an itemized list any one of which will establish bad faith, but are to be considered together to determine if the supervisor "acted responsibly and in conformity with prevailing social norms" in the totality of the circumstances. (*Ibid*.) Angry criticism and occasional shouting addressed at work product, standing alone, is not conduct so outrageous, irresponsible or outside prevailing social norms as to be called bad faith where there is no hint of an improper motive or discrimination. Woo's speculation as to other reasons why Finley might have criticized his work were not corroborated by any testimony or other evidence. And, although the Board did not find discrimination, we also note that Bohus received the same treatment as Woo, belying Woo's expressed perception of disparate treatment. The District met its burden of proving both the subjective and objective requirements of good faith personnel actions and there was no substantial evidence of bad faith.

At oral argument, Woo's attorney suggested that suicide presupposes the supervisorial actions were in bad faith. Irrespective of our personal sympathies, the court is, nonetheless, constrained by the plain language of subdivision (h) which provides for no exceptions. There was no substantial evidence that the

personnel actions were in bad faith. We conclude, therefore, that Woo's death is not compensable.

DISPOSITION

We annul the Board's order.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURRY, J.

We concur:

EPSTEIN, Acting P.J.

HASTINGS, J.